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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHEILA G. MOORE, Plaintiff and Appellant, v. BARRY B. KAUFMAN, Defendant and Respondent; FRANCES L. DIAZ, Objector and Appellant.	B165018 (Los Angeles County Super. Ct. No. BC228943)

APPEAL from orders of the Superior Court of Los Angeles County, J. Stephen Czuleger, Judge. Affirmed.

Frances L. Diaz for Plaintiff and Appellant.

Frances L. Diaz, in pro. per., and Andrew E. Rubin for Objector and Appellant.

Case, Knowlson, Jordan & Wright, J. Patrick Fleming, Jr., and Amy A. Hoff for Defendant and Respondent.

This is the eighth appeal in a series of cases related primarily by a lawyer's vendetta against her opposing counsel. We affirm.

FACTS

A.

In early 1999, Sheila G. Moore, M.D., a radiologist who was a shareholder and employee of Cedars-Sinai Imaging Medical Group, filed a petition for a writ of mandate to enforce her right to inspect the Group's books and records. Moore was represented by Frances L. Diaz, and the Group was represented by Barry B. Kaufman. Moore obtained an order giving her the inspection rights she sought, but she was fired in October. She contested her termination but lost in November when an arbitrator ruled in favor of the Group (and awarded contractual attorneys' fees to the Group as the prevailing party, about $111,000).

In January 2000, Moore returned to court and sought an order to show cause re contempt. Although the trial court stated its intent to issue an order to show cause, and although the court set a date for a contempt hearing, an order to show cause was never issued. The trial court nevertheless denied the Group's request for a continuance, conducted a "default" contempt hearing, found the Group in contempt, imposed a fine of $1,000, and ordered the Group to pay Moore's attorney's fees (about $45,000). The trial court thereafter found that the contempt had been purged by the Group's production of its books and records, but refused to vacate the fee order. In response to the Group's petition for a writ of mandate, we held that the trial court had no jurisdiction to do what it did, and that the orders -- including the fee order -- were void. (*Cedars-Sinai Imaging Medical Group v. Superior Court* (2000) 83 Cal.App.4th 1281 [*Diaz I*].)

We specifically held that, based on "the undisputed fact of full compliance" with the order to produce the books and records, the "matter [was] concluded" and there was "no need to consider whether . . . Moore would be entitled to renew her request for an order to show cause re contempt." (*Diaz I, supra,* 83 Cal.App.4th at p. 1288.) We denied Moore's petition for rehearing and the Supreme Court denied her petition for review. (*Ibid.*)

B.

In February 2001, Moore (represented by Diaz) re-filed her application for an order to show cause re contempt. At a hearing held in March, Diaz told the trial court that our opinion in the prior writ proceedings put "the parties back into the situation they were in before the void orders were issued," that a new order to show cause should issue, and that a contempt hearing should be held. Kaufman (the Group's lawyer) disagreed and so did the trial court, which refused to permit Moore to pursue the contempt. We rejected Moore's appeal from that order and affirmed. (*Moore v. Cedars-Sinai Imaging Medical Group* (June 27, 2002, B149844) [nonpub. opn.] [*Diaz II*].)

C.

Meanwhile, the Group had obtained a judgment confirming the arbitrator's award in the proceedings in which Moore had contested her termination. Moore (still represented by Diaz) appealed from that judgment and from an order denying her motion to vacate the judgment, attacking as biased the arbitrator *she* had selected. The Group (still represented by Kaufman) responded that the appeal was untimely and in any event meritless. We agreed, dismissed the appeal as untimely (but explained why we would in any event have affirmed), and awarded costs (including contractual attorneys'

fees) to the Group, in an amount to be determined by the trial court. (*Moore v. Cedars-Sinai Imaging Medical Group* (Oct. 29, 2002, B145869) [nonpub. opn.] [*Diaz III*].)

D.

In another "meanwhile," in October 2000 Moore (by Diaz) sued the Group for "gender discrimination" allegedly arising from the same facts adjudicated in the arbitration proceedings. At the Group's request, the trial court ordered the case to arbitration, an order challenged by Moore in a petition for a writ of mandate which we, in turn, denied. (*Moore v. Superior Court* (March 27, 2001, B148587) [*Diaz IV*].) When Moore failed to initiate an arbitration, the Group initiated an arbitration against her to recover the attorneys' fees incurred by reason of her "discrimination" action. Moore filed a cross-claim in which she realleged her discrimination claims, but we do not know what, if anything, transpired in that proceeding.

E.

In May 2000, while Diaz and Kaufman were in court on one of these matters, there was some sort of confrontation and Diaz accused Kaufman of harassment and assault. Diaz and Kaufman obtained conflicting declarations from a security guard, Steven Baldwin -- and Baldwin (represented by Diaz) then sued Kaufman and the Group for interference with contract and fraud, claiming Baldwin had been fired from his job for giving a false declaration to Kaufman. Diaz sent the complaint to Kaufman along with a cover letter in which she demanded that he "disqualify [himself] from any further representation of [the Group] in light of the patent conflict of interest."

After Baldwin admitted at his deposition that he was an "at will" employee of the security company that provided services to the court, and that Diaz was representing him on a "pro bono" basis, Kaufman and the Group moved to strike Baldwin's complaint under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.)[1] The motion was granted and a judgment of dismissal was entered. We rejected Baldwin's appeal and affirmed. (*Baldwin v. Kaufman* (April 1, 2003, B152778) [nonpub. opn.] [*Diaz V*].)

F.

In April 2000, while some of the above-described proceedings were underway, Moore (represented by Diaz) sued Kaufman for intentional interference with her employment contract with the Group -- but did not serve Kaufman with summons or the complaint. When the court set a status conference for October 2000, Moore dismissed her complaint without prejudice.

In April 2001, soon after the *Baldwin* action was filed, Moore filed an ex parte application for an order vacating her prior dismissal of this action and for leave to serve the complaint. The ex parte application was denied, and Moore was ordered to proceed by way of noticed motion. Moore then filed a motion -- but did not serve it on Kaufman and instead served another lawyer who also represented Moore. In Kaufman's absence, Moore's motion was granted and the action was reinstated. In May, Moore filed and served a first amended complaint. In June, Kaufman found out about the order relieving Moore from her dismissal. On July 9, Kaufman moved for reconsideration on the ground that Diaz had concealed from the court the fact that Kaufman had not been served

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[1] All section references are to the Code of Civil Procedure.

with the motion to vacate the dismissal, or with notice of the order granting that motion. On July 10, Kaufman filed a motion to strike the first amended complaint. (§ 425.16.)

On July 16, Moore filed a second amended complaint in which (in addition to her claim of intentional interference with contract) she charged Kaufman with legal malpractice, breach of fiduciary duty, breach of contract, and fraud by concealment. On July 25, Kaufman filed a motion to strike the second amended complaint. (§ 425.16.) On July 27, Moore filed opposition to Kaufman's motion for reconsideration of the reinstatement order.

On August 8, the trial court granted Kaufman's reconsideration motion, finding that Diaz's "intent was to mislead the court. [Diaz] was ordered to file and serve a noticed motion [and she] clearly had knowledge of [Kaufman's] address to give notice." The court nevertheless deferred the issue of dismissal to September 7, the date set for the hearing on Kaufman's motion to strike.

On August 14, Moore applied ex parte for an "order restoring [the] case to its dismissed status," claiming the court lacked jurisdiction to grant her earlier motion to reinstate the case because the order of dismissal had been entered at her request. Her ex parte application was denied, and the matter was set for hearing on September 27. On August 15, Moore applied ex parte for an order staying the September 7 hearing on Kaufman's motion to strike until after the September 27 hearing. Her application was denied, and we summarily denied her petition for relief from that order. (*Moore v. Superior Court* (Aug. 29, 2001, B152392) [*Diaz VI*].)

On September 7, the trial court granted Kaufman's motion to strike, dismissed the action with prejudice, awarded attorneys' fees and costs to Kaufman, found that these orders constituted an "adjudicat[ion] on [the] merits" of the action within the meaning of the anti-SLAPP statute, and deemed the relief sought by Kaufman's motion for reconsideration moot. A judgment of dismissal was entered the same day, awarding fees and costs of $42,223.75 to Kaufman, payable jointly and severally by Moore and Diaz. Moore, but not Diaz, filed a notice of appeal from that order. We affirmed, and awarded costs to Kaufman, including attorneys' fees in an amount to be determined by the trial court. (*Moore v. Kaufman* (April 24, 2003, B154357) [nonpub. opn.] [*Diaz VII*].)[2]

G.

On February 6, 2003, almost 18 months after the September 7, 2001, judgment was entered (and about two months before we filed our opinion rejecting Moore's appeal from that judgment), Diaz filed a notice of appeal from two "post-judgment" orders, one entered on January 22, 2003, denying Diaz's motion to correct the September 7, 2001, judgment by deleting all references to her, and the other entered on February 5, 2003, granting Kaufman's motion for sanctions payable by Diaz and Moore for their frivolous efforts to block his attempts to collect his judgment. As we now explain, this appeal (*Diaz VIII*), like its predecessors, lacks all merit.

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[2] That opinion (at page 3) includes this footnote: "Mr. Kaufman is a sole practitioner. Between August 1999 and April 2000, Ms. Diaz complained to the Group's corporate counsel (Gary Jacobs of Christiansen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro) at least half a dozen times about the manner in which Mr. Kaufman was representing the Group. Ms. Diaz's letters and her relentless pursuit of Dr. Moore's claims (and the claims of others) against the Group and against Mr. Kaufman personally suggest a concerted effort by Ms. Diaz to disrupt Mr. Kaufman's relationship with his client and to punish Mr. Kaufman for reasons that do not appear in the record." Diaz remains relentless, her motives still undisclosed, at least to us.

DISCUSSION

A.

Kaufman's anti-SLAPP motion, filed on July 25, 2001, expressly sought fees and costs from "plaintiff Moore and her attorney of record . . . , Frances L. Diaz, Esq., jointly and severally." The trial court's order, signed and entered on September 7, 2001, "granted [that motion to strike] in its entirety" and awarded fees and costs to Kaufman as the prevailing party. (§ 425.16, subd. (c).) On the same day (September 7), the trial court signed and entered a judgment of dismissal providing that Kaufman, "as the prevailing party, shall have and recover from plaintiff Sheila G. Moore, M.D. and/or her counsel, attorney Frances L. Diaz, jointly and severally," an amount to be determined at a later date.

On November 5, Kaufman filed and served a motion to determine the amount of fees payable by Moore. On November 6, Moore (by Diaz) filed a notice of appeal from the September 7 judgment. On January 8, 2002, the trial court granted Kaufman's motion to determine the amount of fees and costs, and interlineated the amount (about $41,000) payable by Moore and Diaz, jointly and severally.

On December 9, 2002 -- more than a year after entry of the September 7, 2001, judgment, and more than eleven months after entry of the order setting the amount of fees -- Diaz filed a motion for an order correcting a "clerical error" in the judgment, claiming the court had never acquired subject matter or personal jurisdiction over her and that, as to her, the judgment was void on its face. Alternatively, Diaz claimed it was a "patent clerical error" that she was named at all.

On January 22, 2003, the trial court denied Diaz's motion, finding that (1) there was no '"clerical error,"' (2) the motion sought a substantive change to a judgment and was, in substance if not form, an untimely motion for reconsideration within the meaning of section 1008, and (3) the judgment was presently pending on appeal and thus not subject to challenge in the trial court.

Meanwhile, in November 2002, Kaufman had filed a motion for sanctions (§ 128.7) on the ground that Moore, with Diaz's aid, had filed frivolous motions to block Kaufman's attempts to enforce his judgment against Moore and Diaz. Over Moore's opposition (filed by Diaz), the motion was granted on February 5, 2003, at which time the court ordered Moore and Diaz, jointly and severally, to pay $3,000 to Kaufman as sanctions.

B.

Diaz contends the February 5, 2003, sanction order is void because the court lost all jurisdiction over this case on October 16, 2000, the date on which the action was dismissed. She is wrong -- because her entire argument ignores the fact that the action was thereafter reinstated at her request. As we explained in *Diaz VI* and *Diaz VII*, the trial court had jurisdiction to do what it did, and that ruling is the law of this case. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 210-212; and see *Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16, 21-22 ["[e]ven after a voluntary dismissal with prejudice has been filed, the trial court *has jurisdiction* to vacate the judgment of dismissal under . . . section 473"].)

C.

Alternatively, Diaz contends the sanction order is inconsistent with section 128.7 because its effect is to "chill zealous advocacy." We disagree, and reject as unadulterated sophistry Diaz's contention that her actions constitute appropriate advocacy on behalf of a client. As shown by our summary of the prior proceedings, this litigation is a vendetta, pursued for reasons unknown to us but nonetheless abhorrent to any notion of fair play. As the trial court aptly put it, Diaz "continuously engaged in asserting arguments not warranted by existing law or the establishment of new law," and continuously engaged in conduct "aimed at unnecessary delay and harassment."

D.

Diaz contends the trial court should have granted her motion to correct the "clerical error" in the judgment. We disagree.

First, Diaz is wrong when she claims the motion did not seek fees and costs payable by her as well as her client. The motion, filed on July 25, 2001, expressly sought fees and costs from "plaintiff Moore and her attorney of record . . . , Frances L. Diaz, Esq., jointly and severally." The trial court's order, signed and entered on September 7, 2001, "granted [that motion to strike] in its entirety" and awarded fees and costs to Kaufman as the prevailing party. (§ 425.16, subd. (c).) As a result, there was no "clerical error." (*Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 117-118.)[3]

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[3] Because the motion to dismiss expressly sought fees from Diaz as well as Moore, and because that motion was granted in its entirety, it is immaterial that Kaufman's later motion to fix the amount of fees referred to Moore but not Diaz. When Diaz filed her opposition to Kaufman's motion to dismiss, she had the opportunity to raise as many arguments as she had about her personal exposure for fees and costs. That she chose not to do so was her decision, not

Second, Diaz -- who filed a notice of appeal on Moore's behalf -- did not file a notice of appeal from the September 7, 2001, judgment for herself, notwithstanding that she knew that judgment made her jointly and severally liable for the award of fees and costs. Since the time to seek reconsideration of or appeal from the judgment had expired long before Diaz filed her motion to correct a "clerical error," and long before she filed this appeal from the order denying that motion (Cal. Rules of Court, rule 2; *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) §§ 3:4 to 3:6, pp. 3-1 to 3-2), Diaz's motion to correct a "clerical error" must be viewed as what it is -- a transparent effort to do indirectly that which she forfeited the right to do directly. For this reason too, her motion was properly denied. (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 937-938.)

Kaufman's, and she will not now be heard to complain that he somehow deprived her of her due process rights or otherwise obtained the benefit of an erroneous ruling. She crafted her theory of the case and she is stuck with it. (*Planned Protective Services, Inc. v. Gorton* (1988) 200 Cal.App.3d 1, 13, disapproved on another ground in *Martin v. Szeto* (2004) 32 Cal.4th 445, 451; *Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 776-777 [an appellate court will not consider procedural defects or erroneous rulings where an objection could have been, but was not, raised in the trial court].) In any event, we believe the order making Diaz jointly and severally liable for Kaufman's fees and costs is correct on the merits. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1414 [the anti-SLAPP statute should be broadly construed to give effect to the Legislature's intent to provide a swift and effective remedy to SLAPP suit defendants].)

DISPOSITION

The orders are affirmed. Kaufman is awarded his costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

SUZUKAWA, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.